Supreme Court, U.S.
FILED
APR 13 2000
CLERK

(2)

No. 99-1176

In the Supreme Court of the United States

MCI COMMUNICATIONS CORPORATION AND SUBSIDIARIES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

PAULA M. JUNGHANS
Acting Assistant Attorney General

DAVID I. PINCUS
JOAN I. OPPENHEIMER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, under the transitional rules of the Tax Reform Act of 1986 that phase out the investment tax credit, a taxpayer that puts property eligible for the credit into service in a particular tax year but carries the credit over to subsequent years is required to decrease its basis in the property by the full amount of the credit for which it was eligible in the year it put the property into service or is instead entitled to decrease its basis in that property by the reduced credit that it utilized in the subsequent year.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions	2
Statement	2
Argument	10
Conclusion	20

TABLE OF AUTHORITIES

Cases:

ABC Rentals of San Antonio, Inc. v. *Commissioner*, 142 F.3d 1200 (10th Cir. 1998)	17-18
American Stores Co. v. *Commissioner*, 170 F.3d 1267 (10th Cir.), cert. denied, 120 S. Ct. 182 (1999)	18
B.F. Goodrich Co. v. *United States*, 94 F.3d 1545 (Fed. Cir. 1996)	8-9, 11, 12
Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)	16
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	19
Commissioner v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152 (1993)	16
Commissioner v. *Schleier*, 515 U.S. 323 (1995)	16
Cory Corp. v. *Sauber*, 363 U.S. 709 (1960)	15
Cowart, Estate of v. *Nicklos Drilling Co.*, 505 U.S. 469 (1992)	12-13
Davis v. *United States*, 495 U.S. 472 (1990)	10, 16
Golsen v. *Commissioner*, 54 T.C. 742 (1970), aff'd on other grounds, 445 F.2d 985 (10th Cir. 1971)	19
Herb v. *Pitcairn*, 324 U.S. 117 (1945)	15
Hubbard v. *United States*, 514 U.S. 695 (1995)	13
International Trading Co. v. *Commissioner*, 275 F.2d 578 (7th Cir. 1960)	11

Cases—Continued: Page

Kosow, Estate of v. *Commissioner*, 45 F.3d 1524 (11th Cir. 1995) 18
Mead Corp. v. *United States*, 185 F.3d 1304 (Fed. Cir. 1999), petition for cert. pending, No. 98-1434 18
Mercantile Bank & Trust Co. v. *United States*, 441 F.2d 364 (8th Cir. 1971) 17
New Colonial Ice Co. v. *Helvering*, 292 U.S. 435 (1934) 10, 11
Parsons v. *Smith*, 359 U.S. 215 (1959) 11
Rath v. *Commissioner*, 101 T.C. 196 (1993) 19
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 13
Simon v. *Commissioner*, 68 F.3d 41 (2d Cir. 1995) 3
Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) 16
Spang Indus., Inc. v. *United States*, 791 F.2d 906 (Fed. Cir. 1986) 18, 19
United States v. *Correll*, 389 U.S. 299 (1967) 15
United States v. *Eddy Bros, Inc.*, 291 F.2d 529 (8th Cir. 1961) 17
United States v. *Howard*, 855 F.2d 832 (11th Cir. 1988) 18
United States v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992) 16

Statutes and regulation:

Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 201(a), 95 Stat. 203 2
Internal Revenue Code (26 U.S.C.):
§ 38(c) (Supp. IV 1986) 5
§ 39(a) (Supp. IV 1986) 5
§ 46 (Supp. IV 1986) 5
§ 46(a) (1982) 3
§ 46(a) (Supp. IV 1986) 7, 9, 12
§ 46(c)(1) (1982) 3, 7, 8, 12
§ 48(q) (Supp. IV 1986) 7, 8, 11
§ 48(q)(1) (1982) 4

Statutes and regulation—Continued: Page

§ 48(q)(1) (Supp. IV 1986) 9
§ 49(b) (Supp. IV 1986) 4
§ 49(c)(1) (Supp. IV 1986) 5
§ 49(c)(2) (Supp. IV 1986) 5
§ 49(c)(3)(A) (Supp. IV 1986) 5
§ 49(c)(5)(A) (Supp. IV 1986) 5
§ 49(d)(1) (Supp. IV 1986) 5
§ 49(d)(1)(A) (Supp. IV 1986) 7, 11
§ 167(a) 2
§ 167(b)(2) (1982) 2
§ 167(b)(3) (1982) 2
§ 168(f)(9) (1982) 3
§ 7482 19
§ 7805(a) 15
Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11812(a), 104 Stat. 1388-534 2
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 205(a), 96 Stat. 427 4
Tax Reform Act of 1986, Pub. L. No. 99-514, § 211, 100 Stat. 2166 4
26 C.F.R. 301.7805-1 18

Miscellaneous:

J. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 Geo. Wash. L. Rev. 35 (1995) 17, 19
L. Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 Ohio St. L.J. 1037 (1995) 17, 19
2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. (1986) 13
Rev. Rul. 87-113, 1987-2 C.B. 33 ..... 5, 6, 9, 10, 14
S. Rep. No. 144, 97th Cong., 1st Sess. (1981) 2
S. Rep. No. 313, 99th Cong., 2d Sess. (1986) 4
S. Rep. No. 494, 97th Cong., 2d Sess., vol. 1 (1982) 3, 4

In the Supreme Court of the United States

No. 99-1176

MCI COMMUNICATIONS CORPORATION AND SUBSIDIARIES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 192 F.3d 1068. The opinion of the district court (Pet. App. 26a-39a) is reported at 26 F. Supp. 2d 6.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1999. The petition for a writ of certiorari was filed on January 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

The relevant portions of Sections 46, 48, and 49 of the Internal Revenue Code, as in effect during the dates relevant to this case, are set forth at Pet. App. 40a-44a.

STATEMENT

1. a. Depreciation deductions have long been employed under the Internal Revenue Code to allow a taxpayer to recover the cost of an asset over its useful life. 26 U.S.C. 167(a). Under the "straight line" method of depreciation, an asset with an initial cost of $1,000,000, a salvage value of $50,000, and a useful life of ten years would generate annual depreciation deductions of $95,000. Pet. App. 2a. Various "accelerated" methods of depreciation—such as the double declining balance method and the sum-of-the-year digits method—were also generally permitted prior to amendments enacted by the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11812(a), 104 Stat. 1388-534. See 26 U.S.C. 167(b)(2)-(3) (1982).

b. In the Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, § 201(a), 95 Stat. 203. Congress enacted a new set of depreciation rules—known as the Accelerated Cost Recovery System (ACRS)—that were designed to stimulate economic expansion. S. Rep. No. 144, 97th Cong., 1st Sess. 47 (1981). The ACRS permits the recovery of capital costs for most tangible depreciable property by using accelerated methods of cost recovery over predetermined periods that are generally shorter than the useful life of the asset. S. Rep. No. 97-144, *supra*, at 48. Depreciation deductions calculated under the ACRS are not based on a steady decline in the value of the asset over its life; they instead assume a rapid decline in value and thus provide an inflated deduction during

the early years of the asset's life. *Simon* v. *Commissioner*, 68 F.3d 41, 45 (2d Cir. 1995). The ACRS also eliminated the concept of salvage value and allowed depreciation of the entire cost of the property. 26 U.S.C. 168(f)(9) (1982).

For most of the period from 1962 through 1985, the Internal Revenue Code also authorized an investment tax credit that equaled 10% of the cost of the asset and was allowed in the year that the asset was placed into service by the taxpayer. 26 U.S.C. 46(a), (c)(1) (1982). Even before the adoption of the ACRS in 1981, taxpayers could obtain a double tax benefit for eligible property by claiming depreciation deductions for the same "costs" they had previously recouped through the investment tax credit. This was because the amount of both the investment tax credit and the depreciation deductions was based on the total "cost" or "basis" of the asset. For example, for an asset costing $1,000,000, the taxpayer could claim an investment tax credit of $100,000 in the year the asset was placed in service and could also take depreciation deductions of $1,000,000 over the life of the asset. Pet. App. 3a. When the even more rapid depreciation rates authorized by the ACRS went into effect in 1981, this double tax benefit problem became quite severe. As the Senate Finance Committee noted in the year following enactment of the ACRS, the combination of ACRS deductions and the investment tax credit "generate[s] tax benefits which have a present value that is more generous than the tax benefits that would be available if the full cost of the investment could be deducted in the year when the investment was made; *i.e.*, more generous than the tax benefits of expensing." S. Rep. No. 494, vol. 1, 97th Cong., 2d Sess. 122 (1982).

c. In 1982, Congress concluded that the enormous tax advantages associated with this combined credit and deduction distorted the allocation of capital throughout the economy. S. Rep. No. 494, *supra*, at 122. Congress therefore reduced these distorting benefits by adding Section 48(q)(1) to the Internal Revenue Code, 26 U.S. C. 48(q)(1) (1982). See Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 205(a), 96 Stat. 427. Under that new provision, the basis of an asset was reduced by 50% of the amount of-an investment tax credit in the year the credit was determined. § 205(a), 96 Stat. 427. An asset costing $1,000,000 would thus continue to yield an investment tax credit of $100,000 but would thereafter generate total depreciation deductions of only $950,000. Pet. App. 3a.

d. In 1986, Congress concluded that the tax benefits resulting from this combination of credit and deduction were still overly generous and continued to cause economic distortion of investment activity. S. Rep. No. 313, 99th Cong., 2d Sess. 96 (1986). Congress therefore repealed the investment tax credit effective as of December 31, 1985. Tax Reform Act of 1986, Pub. L. No. 99-514, § 211, 100 Stat. 2166. In doing so, however, Congress made an exception for "transition property" that was purchased *prior* to 1986 but placed in service in 1986 or thereafter. Although Congress continued to allow a tax credit for such "transition property," the credit was subjected to a phased-out reduction which became known as the investment tax credit "haircut." Transition property placed in service in 1986 received the full 10% credit; property placed in service in 1987 received only an 8.25% credit; and property placed in service in 1988 or later received an investment tax

credit of only 6.5%. 26 U.S.C. 46, 49(b), (c)(1), (c)(3)(A), (c)(5)(A) (Supp. IV 1986).

Of particular significance to this case, the Tax Reform Act of 1986 also applied the investment tax credit "haircut" to tax credits that were not used in the years the property was placed in service (because there were no taxes then owed to apply the credit against) but were instead carried forward to subsequent tax years.[1] The amount of the credit carried forward was reduced by the "haircut" that would apply to any allowable property placed in service in the carryforward year. For example, an unused investment tax credit carried forward to 1988 or a subsequent tax year was reduced, by the investment tax credit "haircut," to 6.5%. 26 U.S.C. 49(c)(2) (Supp. IV 1986).

In addition, the Tax Reform Act of 1986 added Section 49(d)(1) to the Internal Revenue Code to require a basis adjustment for depreciation purposes of 100%, rather than 50%, of the amount of the allowed investment tax credit. 26 U.S.C. 49(d)(1) (Supp. IV 1986). Under that provision, if a taxpayer placed "transition" property costing $1,000,000 in service during 1986, an investment tax credit of $100,000 was permitted and the taxpayer was then required to reduce the basis of the property by $100,000 for depreciation purposes.

e. In 1987, the Treasury Department issued Revenue Ruling 87-113, 1987-2 C.B. 33, to guide taxpayers in applying the complicated rules relating to the repeal of the investment tax credit. Example 3 of that Ruling

---

[1] A tax credit that could not be utilized because the taxpayer had insufficient tax liability for the year to absorb the credit could be carried back for as many as 3 years or carried forward for as many as 15 years to reduce tax liabilities in those years. 26 U.S.C. 38(c), 39(a) (Supp. IV 1986).

addressed the basis reduction required for depreciation purposes when an investment tax credit could not be used in the year the property was placed in service and was carried forward to a subsequent year. In that Example, the taxpayer had placed transition property costing $1,000,000 in service during 1986 (when the investment tax credit was 10%) but was not able to use the credit until 1988 (when the investment tax credit was reduced by the "haircut" to 6.5%). In that situation, the Treasury concluded that the taxpayer was required to reduce its basis for depreciation purposes by the full $100,000 (10% of $1,000,000) and would "not [be] allowed to increase its basis in the property to reflect the reduction in the investment credit carryforward under section 49(c)(2)." 1987-2 C.B. at 35.

2. a. Petitioners filed refund suits, which were consolidated in district court, that raise the exact issue addressed in Example 3 of Revenue Ruling 87-113. Pet. App. 5a, 30a n.5. Petitioner Telecom*USA, Inc. placed "transition" properties in service in calendar years 1986 and 1987, when the investment tax credit was respectively 10% and 8.25%. *Id.* at 5a. Telecom was unable to use its investment tax credits in those years because it had insufficient tax liabilities. It therefore carried the credits forward to 1989 and subsequent years, when the investment tax credit was reduced to 6.5%. *Id.* at 5a-6a. Similarly, petitioner MCI Communications Corporation placed "transition" properties in service in 1986, 1987, and 1988, but could not use the investment tax credits until 1989 and subsequent years when the rate had been reduced to 6.5%. *Id.* at 6a n.3.

In addition to claiming investment tax credits, petitioners claimed ACRS depreciation deductions for the "transition" properties. To compute those deductions, petitioners initially reduced the bases of the "transi-

tion" properties by amounts that reflected the investment tax credits that would have applied if those credits had been used in the years the properties were placed in service. Pet. App. 5a. They subsequently asserted, however, that their tax bases in these properties should have been reduced in the years the properties were placed in service by the lesser amount which, because of the investment tax credit "haircut," they ultimately used in the carryforward years in which the credits were applied.[2] Petitioners filed claims for refund based upon the higher depreciation deductions resulting from their new method of calculating the basis of the "transition" properties. The Service denied the refund claims, and petitioners then commenced these actions in district court. *Id.* at 6a.

b. The cases were presented to the district court on cross-motions for summary judgment. Pet. App. 26a. The government contended that the plain language of Sections 46, 48 and 49 of the Internal Revenue Code supported its position. Under Section 48(q), as amended by the Tax Reform Act of 1986, "if a credit is determined under section 46(a) * * *, the basis of such property shall be reduced by 100% of the amount of the credit so determined." 26 U.S.C. 48q (Supp. IV 1986), as modified by 26 U.S.C. 49(d)(1)(A) (Supp. IV 1986). Section 46(a), in turn, provided that the amount of the investment credit "determined" for any taxable year was based upon specified percentages of the "qualified investment." 26 U.S.C. 46(a) (Supp. IV 1986). Section 46(c)(1) then defined "qualified investment" in terms of

---

[2] For example, with respect to 1986, Telecom contended that it should have reported the basis of its transition property as $23.1 million, reflecting a reduction of only 6.5 %, rather than as $22.2 million, reflecting a reduction of 10 % (C.A. App. JA-019).

property "placed in service" during the taxable year. 26 U.S.C. 46(c)(1) (1982). The government contended that, under the plain text of these provisions, the investment tax credits were "determined" when the transition property was made eligible for the credit by being "placed in service," without regard to whether the taxpayer was able actually to utilize the credit in that year. As the result, Section 48(q) did not authorize the smaller reduction in basis that petitioners sought.

Petitioners did not rely on any specific statutory language but instead urged that their position was supported by Sections 46, 48, and 49 of the Code read as an "integrated whole." Pet. App. 13a. Petitioners were "unable to cite any clear [statutory] language in support of [their] position" and ultimately stated that they found the statutory language involved in this case to be "confusing and technical." *Ibid.* Petitioners relied largely on a contention that the legislative history of the Tax Reform Act provided support for their position. *Id.* at 15a, 35a.

c. The district court entered summary judgment for the government. In holding that petitioners were not entitled to increase their bases in the transition property by the amount of the investment tax credit "haircut," the court relied primarily on the statutory language (Pet. App. 33a-34a):

> [U]nder I.R.C. § 46(a), a credit is determined in the year the qualified asset is placed into service, and I.R.C. 48(q) therefore mandates a reduction in basis that same year, when the credit is determined.

The court found support for its conclusion from the fact that the agency's formal rulings and the decisions of other courts had reached the same conclusion on indistinguishable facts. Pet. App. 33a-34a (citing *B.F.*

Goodrich Co. v. *United States*, 94 F.3d 1545 (Fed. Cir. 1996); Rev. Rul. 87-113, *supra*). The court stated that the legislative history on which petitioners attempt to rely is "irrelevant" and "unpersuasive" and that reliance on such legislative history is misplaced "given the clarity of the [statutory] text." Pet. App. 35a.

3. The court of appeals affirmed. Pet. App. 1a-25a. The appellate court applied the same reasoning as the district court in concluding that the text of Sections 46(a) and 48(q)(1) required the bases of the transition property to be reduced by the amount of the investment tax credits "determined" in the years that the property at issue was "placed in service." Pet. App. 12a-13a. The court stated that the government's construction of these statutory provisions is "more reasonable" (*id.* at 15a), and that its interpretation of the legislative history is "at least as reasonable" (*id.* at 18a) as that of petitioners.

The court noted that petitioners were "unable to point to anything that, with any measure of clarity" entitled them to the deductions they sought. Pet. App. 10a. In particular, the court noted that the unanchored "principles of tax policy" on which petitioners attempted to rely were far "too ambiguous and indeterminate" to guide statutory construction. *Id.* at 18a.[3]

---

[3] Petitioners sought to rely on what they described as the principle of "full cost recovery" in seeking depreciation deductions equal to the full amount of their investments. Pet. App. 18a. The court of appeals recognized, however, that petitioners had already recovered *more than* the full cost of their investments. A tax credit is a dollar-for dollar reduction in tax liability, while a deduction is merely a reduction in taxable income. For petitioners, who were in the 34% marginal bracket, a credit of $10 is therefore approximately equal to a deduction of $30. The combination of the remaining available depreciation deductions and what might be

The court of appeals noted that its analysis in this case was assisted by "two important interpretive guides" that "point in the same direction." Pet. App. 7a. The first "guide" is that a taxpayer bears the burden of demonstrating a clear entitlement to any deduction under the Code. *Ibid.* (citing, *e.g.*, *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 440 (1934)). The second "guide" is that "at least some deference" is owed to the Revenue Ruling as the Treasury's formal, "official interpretation" of these provisions. Pet. App. 7a-8a (citing, *e.g.*, *Davis* v. *United States*, 495 U.S. 472 (1990)).[4] The court of appeals found it unnecessary to decide the exact degree of deference due to revenue rulings because "utilizing even a minimal level of deference—or imposing only a minimal burden of clarity under the first interpretative guide * * * is sufficient to decide the case." Pet. App. 10a. See also *id.* at 22a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, the only other appellate

---

called the "deduction-value" of the investment tax credits is substantially in excess of petitioners' investments in the "transition" properties. *Id.* at 20a-21a.

[4] In the court of appeals, petitioners' counsel conceded that some deference would be due to the Treasury's formal Revenue Ruling under this Court's decision in *Davis*, *supra*. Petitioners argued, however, that only a "minimal level of deference" was owed "because Revenue Ruling 87-113 does not contain an express explanation for its construction of the relevant statutory sections." Pet. App. 10a n.11. As the court of appeals noted, however, the Ruling in fact does "discuss the same statutory language upon which the IRS relies in this case, and sets forth the Service's interpretation of that language." *Ibid.*

decision on the question presented in this case (*B.F. Goodrich Co.* v. *United States*, 94 F.3d 1545 (Fed. Cir. 1996)) reached precisely the same conclusion reached by the courts below. Further review is therefore not warranted.

1. The court of appeals correctly emphasized (Pet. App. 7a) that the taxpayer bears the burden of establishing that Congress has clearly authorized the claimed deduction. As this Court stated in *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 440 (1934):

> Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.

See also *Parsons* v. *Smith*, 359 U.S. 215, 219 (1959); *International Trading Co.* v. *Commissioner*, 275 F.2d 578, 586 (7th Cir. 1960) ("as in the case of all deductions, allowance for depreciation is a matter of legislative grace").

The court of appeals correctly concluded that petitioners failed to sustain that burden in this case and that "the clearest language in the statute" instead supports the government's interpretation. Pet. App. 14a. The governing provision of the Code specifies that "if a credit is determined" for applicable property, then "the basis of such property shall be reduced by 100 percent of the amount so determined." 26 U.S.C. 48(q) (Supp. IV 1986), as modified by 26 U.S.C. 49(d)(1)(A) (Supp. IV 1986). The controlling question of statutory interpretation is "*when* [is] the credit * * * 'determined,' for that is the time at which the basis must be reduced." Pet. App. 14a (emphasis added). Because the amount of the investment tax credit "determined" for any taxable year is specified as a

percentage of the "qualified investment" (26 U.S.C. 46(a) (Supp. IV 1986)), and because a "qualified investment" is defined by reference to property "placed in service" during the taxable year (26 U.S.C. 46(c)(1) (1982)), the plain text of these provisions reflects that the investment tax credit is necessarily "determined" in the year that the property is "placed in service"—and not in some subsequent year in which the credit is later applied against taxes due. Pet. App. 12a-13a. Read in context, the statutory text thus provides that the basis of any "transition" property is to be reduced by the full amount of the investment tax credit for which the taxpayer is eligible in the year the property is placed in service. As the Federal Circuit explained in *B.F. Goodrich Co.* v. *United States*, 94 F.3d at 1549:[5]

> Since the investment tax credit is determined when the property is placed in service, and the statute mandates a reduction in the basis when the credit is determined, we hold that the basis of transition property must be reduced when the taxpayer placed the property in service.

Because the statutory language is plain, legislative history need not be considered. See, *e.g.*, *Estate of*

---

[5] Petitioners err in attempting (Pet. 20 n.7) to distinguish the holding of *B.F. Goodrich* from the identical holding of the court of appeals in this case. In *B.F. Goodrich*, instead of initially reducing the basis of the "transition" property by the full amount of the investment tax credit and then attempting to decrease that reduction through a claim for refund (as petitioners did in this case), the taxpayer made those same adjustments on its original return. As the court of appeals correctly stated in rejecting petitioners' efforts to distinguish *B.F. Goodrich* from the present case, "[t]his procedural difference * * * did not drive the Federal Circuit's opinion" in that case. Pet. App. 13a n.16.

Cowart v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."); *Hubbard* v. *United States*, 514 U.S. 695, 708 (1995) ("Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress."); *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994). Moreover, the court of appeals correctly noted that the relevant history is ambiguous in any event and that the government's interpretation of that history is "at least as reasonable" as the interpretation advanced by petitioners. Pet. App. 18a.[6]

2. a. Because the decision below correctly applies the plain text of the controlling provisions, because there is no conflict among the courts that have addressed and resolved that issue, and because the case involves transition provisions of limited prospective

---

[6] For example, petitioners place great reliance (Pet. 18) on a sentence in the Conference Report which states: "A taxpayer is required to reduce the basis of property that qualifies for transition relief ('transition property') by the full amount of investment credits earned with respect to the transition property (after application of the phased-in 35-percent reduction, described below) * * *." 2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-63 (1986). The court of appeals correctly noted, however, that this sentence is itself ambiguous because it fails to state whether it refers to an investment tax credit used in the same post-1986 year that the property is placed in service (and thus subject to the investment tax credit "haircut" even *without* any carryover of the credit) or only to a carryforward credit. The court noted that "[t]he government, the district court, and the Federal Circuit in *B.F. Goodrich* all read the sentence as referring to current-year rather than carryforward credits—largely because the sentence is not in the subsequent section [of the legislative history] entitled "Reduction of ITC carryforwards and credits." Pet. App. 17a.

importance, further review of the decision in this case is unwarranted. Petitioners err in asserting (Pet. 8) that the decision below nonetheless warrants review because the court of appeals stated that it should "accord at least some deference" (Pet. App. 7a) to Revenue Ruling 87-113. The question of the appropriate standard of deference for Treasury rulings is not properly framed in this case. It would be a rare case in which abstract disputes over the precise articulation of the standard of deference would actually control the proper disposition of a substantive tax controversy. As the court of appeals expressly noted (*id.* at 10a), selection of the appropriate standard of deference does not make any difference here because the government prevailed wholly without reliance on the revenue ruling.

The court explained that, under the decisions of this Court, two interpretive aids could be invoked in this case: (i) that the taxpayer bears the burden of establishing a clear entitlement to a claimed deduction; and (ii) that "at least some deference" is owed to the Treasury's formal revenue rulings. Pet. App. 7a. The court concluded, however, that *either* giving "even a minimal level of deference" to the Ruling "*or* imposing only a minimal burden" of establishing the right to the deduction "under the first interpretive guide discussed above * * * is sufficient to decide this case." *Id.* at 10a (emphasis added). The question whether deference is owed to revenue rulings was thus ultimately immaterial to the decision of the court of appeals. See also *id.* at 22a (the arguments advanced by petitioners fail to "generate[] a principle sufficiently clear *either* to meet [their] burden of showing an entitlement to the deduction [they] seek[] *or* to overcome even a minimal level of deference to Revenue Ruling 87-113") (emphasis added).

Review is thus not warranted in this case because a judgment of this Court on the abstract issue of the appropriate standard of deference to Treasury rulings would not alter the disposition of the substantive controversy. This Court sits "to correct wrong judgments, not to revise opinions" (*Herb* v. *Pitcairn*, 324 U.S. 117, 124 (1945)).

b. In any event, this Court has long held that deference is owed to the formal revenue rulings adopted by the Treasury to interpret and give guidance to taxpayers under the Internal Revenue Code. Since its earliest formulations, the Internal Revenue Code has directed the Secretary of the Treasury to "prescribe all needful rules and regulations for the enforcement" of the Code. 26 U.S.C. 7805(a). Recognizing that Congress thereby empowered and directed the Treasury to adopt formal interpretations of the provisions of the Code, this Court held in *United States* v. *Correll*, 389 U.S. 299, 306-307 (1967), that such revenue rulings are entitled to substantial deference:

> Alternatives to the Commissioner's * * * rule are of course available. Improvements might be imagined. But we do not sit as a committee of revision to perfect the administration of the tax laws. Congress has delegated to the Commissioner, not to the courts, the task of prescribing "all needful rules and regulations for the enforcement" of the Internal Revenue Code. 26 U.S.C. § 7805(a). In this area of limitless factual variations, "it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments. *Commissioner* v. *Stidger*, 386 U.S. 287, 296.

See also *Cory Corp.* v. *Sauber*, 363 U.S. 709, 712 (1960) (per curiam). The Court reached the same conclusion in

Davis v. *United States*, 495 U.S. 472, 484 (1990), holding that "considerable weight" should be given to revenue rulings that have "been in long use" and that reflect the agency's "contemporaneous construction of [the] statute." As the court of appeals noted in this case, the two conditions that were the basis for the "considerable weight" accorded in *Davis* are also present here. Pet. App. 8a.

Decisions such as *Commissioner* v. *Keystone Consolidated Industries, Inc.*, 508 U.S. 152 (1993), which "express[ed] no view as to whether they [revenue rulings] are or are not entitled to deference" (*id.* at 162 n.3), and *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992), which "spoke neutrally to the question of whether deference was due" (Pet. App. 8a n.5), neither conflict with nor overrule *Correll* or *Davis*. And, as the court of appeals noted in this case (Pet. App. 8a n.5), the statement in *Commissioner* v. *Schleier*, 515 U.S. 323, 336 n.8 (1995), that revenue rulings "may not be used to overturn the plain language of a statute" is obviously not a rejection of the standard of deference applied in cases such as *Correll*. The question of deference to an agency's interpretation of a statute does not even arise when "the plain language of a statute" resolves the interpretive issue. See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering.") [7]

---

[7] Petitioners err in relying (Pet. 12) on *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988). The "agency's convenient litigating position" (*id.* at 213)—to which this Court declined to defer in *Bowen*—was not a revenue ruling; it was a

c. Petitioners further err in asserting (Pet. 13) that, notwithstanding this Court's clear precedent, the courts of appeals are in conflict in determining whether deference is owed to the Treasury's formal revenue rulings. As the court of appeals correctly stated, "virtually all of the Circuits" give deference to revenue rulings. Pet. App. 8a. Following this Court's decisions that require that deference be given to agency interpretations of the statutes that they are charged with administering, the "circuit courts have uniformly held that Revenue Rulings receive significant deference * * * ." J. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 Geo. Wash. L. Rev. 35, 82 (1995). These consistent decisions reflect "that non-deference is now a relic of the past." L. Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 Ohio St. L.J. 1037, 1094 (1995).

Petitioners are simply wrong in claiming (Pet. App. 13) that the Eighth, Tenth, Eleventh, and Federal Circuits give no deference to revenue rulings. Those courts, like all other courts of appeals, have unambiguously held that revenue rulings are entitled to deference. See, *e.g.*, *United States* v. *Eddy Bros., Inc.*, 291 F.2d 529, 531 (8th Cir. 1961) ("Revenue rulings are entitled to consideration but are accorded less weight than treasury regulations.");[8] *ABC Rentals of San*

---

retroactive rule adopted by a *different* agency under a *different* statute that purported retroactively to limit Medicare reimbursement and that was "wholly unsupported by regulations, rulings, or administrative practice." *Id.* at 212.

[8] The decision that petitioners cite from the Eighth Circuit—*Mercantile Bank & Trust Co.* v. *United States*, 441 F.2d 364 (8th Cir. 1971)—is not to the contrary. Although the court suggested in that case that revenue rulings "are of little aid in interpreting

Antonio, Inc. v. *Commissioner*, 142 F.3d 1200, 1205 (10th Cir. 1998) ("Revenue rulings are given considerable weight when they are issued contemporaneously with the enactment of the statute * * *."); *American Stores Co.* v. *Commissioner*, 170 F.3d 1267 (10th Cir.), (revenue rulings are entitled to "some consideration"), cert. denied, 120 S. Ct. 182 (1999); *United States* v. *Howard*, 855 F.2d 832, 836 (11th Cir. 1988) (revenue rulings are "entitled to respectful consideration" and "are to be given weight as expressing the studied view of the agency whose duty it is to carry out the statute"; internal quotation marks omitted);[9] *Spang Indus., Inc.* v. *United States*, 791 F.2d 906, 913 (Fed. Cir. 1986) ("a revenue ruling is entitled to some weight as reflecting the Commissioner's interpretation of the regulation * * *").[10]

---

statutes" (*id.* at 368), the court in fact considered the rulings and simply concluded that they did not support the taxpayer's position. *Id.* at 367.

[9] In *Estate of Kosow* v. *Commissioner*, 45 F.3d 1524 (11th Cir. 1995), the court declined to consider the applicability of a revenue ruling when the Commissioner had not relied on it. 45 F.3d at 1529. The court's statement in dicta that revenue rulings are "merely an opinion of an IRS attorney" (*id.* at 1528 n.4) is simply incorrect: revenue rulings are in fact adopted by the Commissioner of Internal Revenue and may be issued only with the "approval of the Secretary [of the Treasury]" (26 C.F.R. 301.7805-1).

[10] *Mead Corp.* v. *United States*, 185 F.3d 1304 (Fed. Cir. 1999), petition for cert. pending, No. 99-1434, on which petitioners rely (Pet. 13), involved Customs Service rulings, not revenue rulings. The statement in that opinion that the Federal Circuit has not afforded "*Chevron* deference" to revenue rulings (185 F.3d at 1307) is, in any event, either incorrect or unclear. If the court in *Mead Corp.* meant that the Federal Circuit has not given "full" "*Chevron* deference" to such rulings—in the sense of according them the same "controlling weight" that would be accorded to a legislative

As commentators have noted, the "Tax Court is unique in its absolute refusal to yield to IRS revenue rulings." Galler, *supra*, 56 Ohio St. L.J. at 1059. See, *e.g.*, *Rath* v. *Commissioner*, 101 T.C. 196, 205 n.10 (1993).[11] The fact that the Tax Court has not routinely deferred to revenue rulings, however, does not establish a basis for further review in this case. It is not possible for there to be a "conflict" between a decision of a court of appeals and a decision of the United States Tax Court. The decisions of the Tax Court are appealable to the courts of appeals (26 U.S.C. 7482), and the Tax Court has acknowledged that it is bound prospectively to apply those appellate decisions. See *Golsen* v. *Commissioner*, 54 T.C. 742, 756-757 (1970), aff'd on other grounds, 445 F.2d 985 (10th Cir. 1971).[12]

---

regulation or the "considerable weight" that would be accorded to an interpretive regulation (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984))—that statement would be correct. But the Federal Circuit has clearly held that revenue rulings are entitled to "some weight" in interpreting the statute. *Spang Indus., Inc.* v. *United States*, 791 F.2d at 913. The statement in the decision below that revenue rulings are entitled to "some deference" (Pet. App. 7a) obviously does not conflict with this Federal Circuit authority. In *Mead Corp.*, by contrast, the Federal Circuit determined that it would give no deference whatever to a customs ruling, and the United States has filed a petition for a writ of certiorari seeking review of that holding in that case.

[11] Professor Coverdale has noted that the Tax Court's refusal to defer to revenue rulings "distorts reality and must be rejected." 64 Geo. Wash. L. Rev. at 84.

[12] The allegedly "divergent standards of 'deference'" accorded to revenue rulings (Pet. 14) is not an issue that could justify review in this case. The court of appeals did not find it necessary to base its decision in this case on the revenue ruling (see pages 14-15,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

PAULA M. JUNGHANS
Acting Assistant Attorney General

DAVID I. PINCUS
JOAN I. OPPENHEIMER
Attorneys

APRIL 2000

---

supra), and the court found it unnecessary to address the "precise calibration" of the degree of deference owed to such rulings. Pet. App. 10a.